

ARKANSAS SUPREME COURT

No. CR 08-1228

KEVIN JOSEPH STEINKUEHLER
Appellant

v.

STATE OF ARKANSAS
Appellee

Opinion Delivered February 26, 2009

PRO SE MOTION FOR EXTENSION
OF BRIEF TIME AND ACCESS TO
RECORD [CIRCUIT COURT OF
PERRY COUNTY, CR 2004-11, HON.
BARRY A. SIMS, JUDGE]

APPEAL DISMISSED; MOTION
MOOT.

PER CURIAM

In 2005, appellant Kevin Joseph Steinkuehler entered a plea of guilty to first-degree murder and was sentenced to 480 months' incarceration. No appeal was taken from the judgment.

Subsequently, appellant timely filed in the trial court a pro se petition for postconviction relief pursuant to Arkansas Rule of Criminal Procedure 37.1, and a pro se motion for leave to file an amended Rule 37.1 petition. Later, through counsel, appellant sought leave of the court to file a "second amended" Rule 37.1 petition. In 2008, the trial court denied the original Rule 37.1 petition,¹ and appellant has timely lodged a pro se appeal here from the order of denial.

Now before us is appellant's pro se motion for an extension of time to file his brief-in-chief, and for access to the record on appeal. As appellant could not be successful on appeal, the appeal is dismissed and the motion is moot. An appeal from an order that denied a petition for a

¹In a separate order entered on the same day, the trial court also denied the two motions for leave to file an amended Rule 37.1 petition. The notice of appeal stated the date of the order from which the appeal was taken, but did not specifically identify which of the two orders, or both, notice was being given. As the appeal is dismissed, the inexact intent of the notice of appeal will not be addressed.

postconviction remedy will not be permitted to go forward where it is clear that the appellant could not prevail. *Johnson v. State*, 362 Ark. 453, 208 S.W.3d 783 (2005) (per curiam).

In the petition filed in the trial court, appellant complained that the trial court violated his rights by failing to comply with discovery disclosure rules, and that he received ineffective assistance of counsel. Regarding the claim that the trial court violated appellant's rights, this allegation is not cognizable in a Rule 37.1 petition because it concerns discovery and evidentiary matters. Allegations regarding evidentiary issues are not the proper basis for a Rule 37.1 petition. *Johnson v. State*, 321 Ark. 117, 900 S.W.2d 940 (1995). Arguments of this nature constitute a direct attack on the judgment and thus cannot be raised in a postconviction proceeding. *Camargo v. State*, 346 Ark. 118, 55 S.W.3d 255 (2001).

In the latter claim for relief, appellant maintained that counsel was ineffective for advising appellant to enter a plea of guilty to first-degree murder, his guilty plea was coerced and he wanted to proceed to trial on the charge of first-degree murder. Under the standard for showing ineffective assistance of counsel, appellant must prove that counsel's performance was deficient and, as a result, appellant was deprived of a fair trial. *Strickland v. Washington*, 466 U.S. 668 (1984); *Jackson v. State*, 352 Ark. 359, 105 S.W.3d 352 (2003). Where a case involves an allegation of ineffectiveness in relation to a guilty plea, the appropriate standard of prejudice is whether, but for counsel's errors, there is a reasonable probability that the defendant would not have entered a guilty plea and thereby waived his right to a trial. *Jones v. State*, 355 Ark. 316, 136 S.W.3d 774 (2003). There is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Noel v. State*, 342 Ark. 35, 26 S.W.3d 123 (2000).

First, appellant failed to establish that counsel was ineffective for advising him to enter a plea

of guilty. He was required to show a reasonable probability that, but for counsel's advice, he would not have entered the plea or waived his right to a trial. *Jones v. State, supra*. To meet this burden, appellant must point to specific errors on the part of counsel. *Crockett v. State*, 282 Ark. 582, 669 S.W.2d 896 (1984) (citing *United States v. Cronin*, 466 U.S. 648 (1984)). In the original Rule 37.1 petition, appellant merely concluded that evidence in the matter proved his innocence, but did not show specific errors on the part of counsel to support his argument. *Crockett v. State, supra*.

Further, a defendant whose conviction is based on a plea of guilty ordinarily will have difficulty in proving prejudice since his plea rests on the admission in court that he did the act with which he is charged, as is the case here. *Crockett v. State, supra*. The record on appeal contains his signed guilty plea agreement, and a transcript of the guilty plea hearing. At the hearing, appellant admitted that he was guilty, denied that his plea was coerced, acknowledged that he understood that entering a guilty plea waived his right to a jury trial and stated that he was satisfied with his attorney's representation. Appellant did not show that he was prejudiced by counsel's allegedly ineffective advice.

Appellant also failed to demonstrate that his guilty plea was coerced. As noted, he admitted at the plea hearing that his plea was not coerced. In addition, in the order that denied Rule 37.1 relief, the trial court found that appellant's guilty plea was voluntarily and intelligently entered. Appellant provided no proof that supported his claim of coercion or that he suffered prejudice.

Finally, appellant contended that he had always intended to proceed to trial on the charge of first-degree murder. However, that contention is factually unfounded. Appellant was originally charged with capital murder. As part of the plea agreement, his capital murder charge was reduced to first-degree murder. Without entry of the guilty plea, appellant would have proceeded to a jury

trial on the capital-murder charge. He failed to establish that he was prejudiced by counsel's actions as to this point.

Appeal dismissed; motion moot.